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If Goliath Falls: Judge Gorsuch and the Administrative State

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Introduction

When it comes to Judge Gorsuch's views on administrative law, the focus has been on one opinion—his concurrence in *Gutierrez-Brizuela v. Lynch*.[1] In addition to authoring the majority opinion,[2] Judge Gorsuch concurred separately to air concerns over *Chevron*'s rule requiring courts to defer to the judgments of executive agencies.[3] "We managed to live with the administrative state before *Chevron*," he wrote.[4] "We could do it again."[5] Commentators across the political spectrum have seized upon the opinion, praising[6] and criticizing[7] it as indicative of a willingness to abandon a pillar of the modern administrative

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1. 834 F.3d 1142 (10th Cir. 2016).
2. *See id.* at 1143, 1147-49 (holding the Bureau of Indian Affairs could not apply its decision imposing stricter standards for adjustment of status petitions to a petition filed after that decision was issued but before the Tenth Circuit overruled prior case law to approve the new standards).
3. *See id.* at 1149, 1153 (Gorsuch, J., concurring); *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (setting out the two-step framework for *Chevron* deference).
4. *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).
5. *Id.*
6. *See, e.g.*, David Feder, *The Administrative Law Originalism of Neil Gorsuch*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch. Other commentators recognize that the *Chevron* debate does not always have a clear political valence. *See, e.g.*, Diane Klein, *Gorsuch,* Gutierrez-Brizuela*, and Goodbye,* Chevron, DORF ON LAW (Feb. 1, 2017), http://www.dorfonlaw.org/2017/02/gorsuch-gutierrez-brizuela-and-goodbye.html.
7. *See, e.g.*, Alexander C. Kaufman, *Trump's Supreme Court Pick Wants to Gut Legal Rule That Environmental Groups Rely On*, HUFFINGTON POST (Feb. 13, 2017, 4:01 PM ET), http://huff.to/2kpZdXp.

state. But those tempted to rush to *Chevron*'s defense or to hasten its demise will miss other aspects of Judge Gorsuch's administrative law jurisprudence.

I. Facing the Behemoth

Judge Gorsuch's *Gutierrez-Brizuela* concurrence indicts the status quo, claiming that "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[8] Arguing from the Framers' understanding, Judge Gorsuch explains why we should care about the separation of powers in the first place—alluding to fundamental concerns of fair notice, equal protection, and democratic legitimacy—and why, in his view, *Chevron* and *Brand X* should raise concerns "[e]ven under the most relaxed or functionalist view of our separated powers."[9]

He also questions the doctrine's underlying logic. The Court in *Brand X* held that "judicial precedent [may not] foreclose an agency from interpreting an ambiguous statute"[10] because *Chevron*'s premise is that "ambiguities in statutes . . . are delegations of authority to the agency to fill the statutory gap."[11] So agencies must be permitted to overrule earlier judicial decisions in some circumstances. Granting that this rule "follow[s] pretty naturally" if one accepts *Chevron*'s premise, Judge Gorsuch attacks the premise, arguing that "*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that."[12] None of this was necessary to decide the case. Nevertheless, Judge Gorsuch seized an opportunity to "bring[] the colossus" of the administrative state "fully into view."[13]

II. Frenetic Lawmaking

In two recent cases, Judge Gorsuch opined sua sponte about the excessive proliferation of conflicting agency directives. In *El Encanto, Inc. v. Hatch Chile Co.*, he refused to defer to a "sub-regulatory manual" to determine the scope of permissible discovery in Trademark Trial and Appeal Board proceedings, in part because the party's proposed reading would have conflicted with the notice-

8. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

9. *Id.* at 1149-51, 1155. Judge Gorsuch might also be interested in the historical origins of *Chevron* itself. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (tracing historical origins of judicial deference to executive statutory interpretation).

10. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

11. *Id.* at 980.

12. *Gutierrez-Brizuela*, 834 F.3d at 1151, 1153 (Gorsuch, J., concurring).

13. *Id.* at 1151.

and-comment regulations of the Patent and Trademark Office (PTO).[14] But Judge Gorsuch had independent grounds for rejecting the informal guidance: the PTO manual expressly disclaimed force-of-law authority.[15] Nevertheless, he chided that "if the agency is indeed so confused that it has spoken out of both sides of its regulatory mouth, it has to be the side speaking unambiguously through formal rulemaking . . . that speaks the more loudly."[16]

Last year, in *Caring Hearts Personal Home Services, Inc. v. Burwell*, Judge Gorsuch wrote that the Centers for Medicare and Medicaid Services simply "applied the wrong law" when it penalized a health services provider pursuant to regulations it adopted *after* the contested services were provided.[17] Although the case involved seemingly simple retroactivity issues, Judge Gorsuch characterized it as "a case about an agency struggling to keep up with the furious pace of its own rulemaking."[18] Apart from his concern that the judiciary is no longer saying "what the law is,"[19] he worried that "legislating agencies don't know what their *own* 'law' is."[20] And in "a world in which the laws are 'so voluminous they cannot be read'" by the agency that promulgates them, he argued, our "constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake."[21]

III. Substance over Form

Judge Gorusch's skepticism of *Chevron*'s premise is paradigmatic of his willingness to privilege substance over form in the administrative law context. *De Niz Robles v. Lynch* provides another example.[22] There, he wrote for the panel that, while the Board of Immigration Appeals could overrule an earlier interpretation of a statute by the Tenth Circuit under *Brand X*, it could not apply its new rule retroactively to an earlier-filed petition for adjustment of status.[23] He noted that, unlike adjudication, legislation is presumed not to operate retroactively because of due process and equal protection interests.[24] Although an agency's exercise of *Brand X* authority in an adjudication is ostensibly

14. 825 F.3d 1161, 1165-66 (10th Cir. 2016).

15. *Id.* at 1166.

16. *Id.*

17. 824 F.3d 968, 970 (10th Cir. 2016).

18. *Id.*

19. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151-52 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803)).

20. *Caring Hearts*, 824 F.3d at 969-70 (emphasis added).

21. *Id.* at 976 (quoting THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961)).

22. 803 F.3d 1165 (10th Cir. 2015).

23. *Id.* at 1171-72.

24. *Id.* at 1169-71.

adjudicatory, Judge Gorsuch reminded readers that "substance doesn't always follow form."[25] In reality, "an agency operating under the aegis of *Chevron* step two and *Brand X* comes perhaps as close to exercising legislative power as it might ever get."[26]

In a passage recognizing the limits on this "analogy to legislative activity,"[27] Judge Gorsuch clarified his view. Although recognizing *Brand X* adjudications have force of law only after *judicial* approval, he insisted that "what's at issue in these cases is an *agency* decision" and that decision is "a policy choice subject to revision"—not an authoritative interpretation of law.[28] It is no surprise, then, that he wonders "whether the combination of *Chevron* and *Brand X* further muddles the muddle."[29] Because the agency is making policy—not interpreting law—and because courts are deferring to that policy judgment, it's policy all the way down.[30]

IV. Delegation Run Riot

This all invites the question: other than through deference, how are judges to get along in a world where statutes are often little more than statements of policy? Indeed, *Chevron* is arguably justified by the very separation of powers concerns that animate Judge Gorsuch's jurisprudence since it rests on the view that resolving statutory ambiguity requires courts to venture beyond the "traditional tools of statutory construction"[31] and make essentially legislative judgments. Scrapping *Chevron* could merely swap one separation of powers problem for another.[32]

It is unsurprising, then, that Judge Gorsuch displays sympathy for the nondelegation doctrine. *United States v. Nichols*[33] is a telling example. There, the Tenth Circuit declined to rehear a panel decision upholding the Sex Offender Registration and Notification Act, which delegated to the Attorney General authority to determine the statute's retroactive effect but provided no guidance on how to do so.[34] Judge Gorsuch dissented from the denial of rehearing.

25. *Id.* at 1173.

26. *Id.* at 1172.

27. *See id.* at 1174.

28. *Id.* at 1174 n.7.

29. *Id.* at 1171.

30. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150-51 (10th Cir. 2016) (Gorsuch, J., concurring).

31. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

32. Indeed, the alternative is potentially more problematic. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013).

33. United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (en banc).

34. *See id.* at 668 (Gorsuch, J., dissenting from the denial of rehearing en banc).

Rooting his analysis in the Constitution's text and the Framers' understanding,[35] he argued that the statute "effectively pass[ed] off to the prosecutor the job of defining the very crime he is responsible for enforcing" and therefore unconstitutionally delegated legislative authority to the executive branch.[36] That analysis transcended the facts of the case.[37] And *Nichols* is no anomaly.[38]

At the same time, Judge Gorsuch admits the difficulties inherent in nondelegation. Namely, he recognizes that the "[d]elegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line."[39] But *Nichols* demonstrates a recognition that, as he has written in another context, "the difficulty of a task is not reason enough to abandon it, especially if it illuminates and aids in the enforcement of underlying constitutional demands."[40]

V. A Radical Departure?

Some have suggested that Judge Gorsuch's views would represent a major shift from Justice Scalia's.[41] But that is far from clear. After initially endorsing *Chevron*,[42] Justice Scalia appeared to exhibit buyer's remorse.[43] For example, he recognized *Chevron* may not have been "faithful to the text of the Administrative Procedure Act,"[44] insisted on strict application at step one[45] and step two,[46]

35. *See id.* at 670.

36. *Id.* at 677.

37. *See, e.g.*, *id.* at 670 ("So it is that 'to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government.'" (alteration in original) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002))).

38. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153-55 (10th Cir. 2016) (Gorsuch, J., concurring).

39. *Nichols*, 784 F.3d at 677 (Gorsuch, J., dissenting from the denial of rehearing en banc).

40. De Niz Robles v. Lynch, 803 F.3d 1165, 1174 (10th Cir. 2015).

41. *See, e.g.*, Jonathan H. Adler, *Gorsuch's Judicial Philosophy Is Like Scalia's—With One Big Difference*, WASH. POST (Feb. 1, 2017), http://wapo.st/2mdhiKq.

42. *See* Justice Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, *Duke Law Journal* Administrative Law Lecture (Jan. 24, 1989), *in* 1989 DUKE L.J. 511, 516-17.

43. Justice Alito recently stated that Justice Scalia was "rethinking the whole question of *Chevron* deference." *See* Robin Bravender, *Alito Snubs* Chevron*, Obama EPA's 'Eraser,'* GREENWIRE (Nov. 17, 2016), http://www.eenews.net/greenwire/2016/11/17/stories/1060045952.

44. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

45. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 227-29 (1994).

46. *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442-44 (2014); Christensen v. Harris County, 529 U.S. 576, 591 (2000) (Scalia, J., concurring in part and concurring in the judgment).

suggested *Chevron* should not apply at all in criminal cases,[47] dissented from the *Brand X* rule,[48] lambasted *Auer* deference,[49] and conceded the nondelegation doctrine is "essential to democratic government."[50] And for his part, Judge Gorsuch recognizes that in a post-*Chevron* world "courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute."[51]

The suggestion that Judge Gorsuch would represent a radical shift may also mistake his propensity to critically examine doctrine for a penchant to destroy it. But asking *why* doctrine looks the way it does seems like the quintessential task of a Supreme Court Justice.[52] And some of the shifts Judge Gorsuch might foreseeably bring about—like refusing to defer on pure questions of law[53] and closely scrutinizing an agency's cost-benefit analysis[54]—have already been suggested by others.

Moreover, Judge Gorsuch emphasizes that formalism matters because our constitutional structure has consequences for "personal liberty, fair notice, and

47. *See* Whitman v. United States, 135 S. Ct. 352, 352-54 (2014) (Scalia, J., statement respecting the denial of certiorari).

48. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1014-17 (2005) (Scalia, J., dissenting); *see also Mead*, 533 U.S. at 248 (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency . . . .").

49. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211-13 (2015) (Scalia, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).

50. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

51. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). In our review of precedential opinions, Judge Gorsuch regularly sided with agencies. For example, in labor cases involving the NLRB, Gorsuch sided with the agency in three out of four cases. *Compare* Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1200 (10th Cir. 2014) (voting with the NLRB), Pub. Serv. Co. of N.M. v. NLRB, 692 F.3d 1068, 1079 (10th Cir. 2012) (voting the same way), *and* Laborers' Int'l Union, Local 578 v. NLRB, 594 F.3d 732, 734 (10th Cir. 2010) (voting the same way), *with* NLRB v. Cmty. Health Servs., Inc., 812 F.3d 768, 780 (10th Cir. 2016) (Gorsuch, J., dissenting) (voting against the NLRB).

52. Indeed, the sitting Justices recently raised serious questions about *Chevron*, seemingly sussing out one another's views in anticipation of a new colleague. *See* Transcript of Oral Argument at 11-12, 14-18, 38-39, Esquivel-Quintana v. Sessions, No. 16-54 (U.S. Feb. 27, 2017).

53. *See* Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part); *cf.* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

54. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 230, 235 (2009) (Breyer, J., concurring in part and dissenting in part).

equal protection."[55] In a speech discussing *De Niz Robles v. Lynch*,[56] he bemoaned that our separation of powers—the original solution to the problem of "parchment barriers"[57]—has become parchment itself: "[A]n *executive* agency acting in a faux-*judicial* proceeding and exercising delegated *legislative* authority purported to overrule an existing *judicial* declaration about the meaning of existing law and apply its new *legislative* rule retroactively to already completed conduct."[58] But he couched his structural concerns in practical, human terms: "What did all this mixing of what should be separated powers mean for due process and equal protection values?"[59] That "after a man relied on a judicial declaration of what the law was," an agency changed the rules, penalizing Mr. De Niz Robles "for conduct he couldn't alter, and denying him any chance to conform his conduct to a legal rule knowable in advance."[60]

At first blush, Judge Gorsuch's concerns may seem to run in different directions. His objection to *Brand X* is that agencies are encroaching on the judicial power "to render authoritative judgments about what a statute means."[61] But his criticism of *Chevron*—and muddling of executive and legislative authority—rests on the notion that current doctrine "permit[s] agencies to *make* the law."[62] No matter. Judge Gorsuch recognizes the incompatibility between these competing judicial-separation-of-powers and legislative-nondelegation narratives.[63] But his thesis does not rise or fall on either. Rather, the ultimate principle is *judicial* nondelegation: "[f]or whatever the *agency* may be doing . . . , the problem remains that *courts* are not fulfilling their duty to interpret the law."[64]

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55. Judge Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), *in* 66 CASE W. RES. L. REV. 905, 915 (2016); *see* Peter Margulies, *Judge Gorsuch on Empathy and Institutional Design*, LAWFARE (Feb. 2, 2017, 12:29 PM), https://www.lawfareblog.com/judge-gorsuch-empathy-and-institutional-design.

56. 803 F.3d 1165 (10th Cir. 2015).

57. *See* THE FEDERALIST NO. 48 (James Madison), *supra* note 21, at 308.

58. Gorsuch, *supra* note 55, at 915.

59. *Id.*

60. *Id.*

61. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring); *see also id.* at 1150 ("Quite literally then, . . . an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals.").

62. *See id.* at 1152; *see also* De Niz Robles v. Lynch, 803 F.3d 1165, 1174 n.7 (10th Cir. 2015) (portraying agencies as "mak[ing] policy judgments," not "construing statutory text").

63. *See Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (contrasting differing "account[s]" of agency action).

64. *Id.* at 1152-53.

To be sure, Judge Gorsuch's views admit of certain tensions. His conclusion that *Chevron* may be "a judge-made doctrine for the abdication of the judicial duty"[65] raises the ultimate question with which he will be peppered in coming weeks: what *is* the judicial duty? Considering judges adopted *Chevron* with a view toward judicial restraint,[66] what is a judge committed to full-throated judicial responsibility to do? If "goliath . . . falls,"[67] who will take his place? We may find out soon enough.

65. *Id.* at 1152.

66. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013) ("We have cautioned that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency. . . . That is precisely what *Chevron* prevents." (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980))).

67. *See Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring).